

## HUMAN SERVICES BOARD

# INTRODUCTION

## FINDINGS OF FACT

1. The petitioner is the mother of three children who are the subject of support orders by two different fathers. All of her children received support through the ANFC program from November 14, 1989 through April 1, 1990 and August 10, 1990 through April 30, 1995. Some \$12,000 was paid out on behalf of the children during this time by the Department of Social Welfare (now PATH).

2. In August of 1996, the current order of support with regard to the youngest child (who is now 14) was established in a Florida court. At that time, the

Florida court issued a judgment for arrearages in the amount of \$5,718 payable to the "Department" without specifying what period of time it was for.

3. The Office of Child Support determined that the entire amount was due to the Department of Social Welfare based on its prior assignment of support rights which it obtained while the petitioner was receiving ANFC. However, because of a clerical error, the entire amount was sent to the petitioner. The error was not noticed until May of 2000 when the petitioner was at the OCS office preparing affidavits for a modification of support hearing. The petitioner was notified subsequently that she had been overpaid the \$5,718 and that 10% of support amount due to her in the future would be recovered to repay that overpayment.

4. At the petitioner's request, OCS reviewed its original determination that the petitioner was not entitled to the \$5,718. OCS divided the \$5,718 by the monthly amount and determined that the arrearage order was meant to cover the prior 49 ½ months. It also determined that the petitioner was not on ANFC for fourteen of those months included in the order. OCS determined to deduct the amount for fourteen months and

calculated that the petitioner was entitled to \$1,619.42 of the arrearage amount. The amount which the petitioner still owed OCS from the overpayment was calculated as \$4098.58. The petitioner does not dispute the accuracy or fairness of that particular calculation.

5. Pursuant to this new amount, OCS began collecting \$12.20 from the petitioner's child support payments. In May of 2000, OCS intercepted \$1,864 from the child's father's tax refund and applied it to the balance instead of turning it over to the petitioner. The petitioner was mailed a letter asking her to pay the \$2,055 still owed. At that point, the petitioner asked for a formal administrative review with OCS.

6. OCS issued a decision of September 28, 2000 stating that it would not disburse the \$1864 to the petitioner as it had been properly credited to the State arrearage account. It did determine, as a discretionary matter, to waive its right to any further repayment based on the fact that the mistaken payment was not detected for four years.

7. The petitioner appealed that order and asks now that the intercepted tax return which was collected on behalf of PATH be returned to her. She asks this as a

matter of equity for treatment she received from OCS. The petitioner provided the Board with a document of some dozen pages detailing the ways she believes OCS mishandled their obligations to assist her in the pursuit of child support from both of the fathers of her children. She accuses OCS of failing to pursue support orders in a timely fashion, failing to modify court orders when needed and failure to enforce orders through court action and other available remedies. She claims that she was forced onto welfare by OCS' inaction and that her children have lost over a hundred thousand dollars in the past eleven years due to negligence by OCS. OCS does not dispute that it made mistakes in her case but claims that new procedures have been put in place to prevent such errors in the future.

#### ORDER

The decision of OCS to keep the tax return intercepted as repayment of the misallocated arrearage is affirmed.

REASONS

When children become ANFC recipients, PATH (formerly DSW) receives an assignment of any rights to support the children may have by operation of law. 33 V.S.A. § 3902. OCS has an obligation to allocate to PATH any child support payments it receives which cover the periods of support, both currently and retroactively. 42 U.S.C. § 608; 45 C.F.R. 302.51. As a means of collecting support payments in arrears, OCS may intercept the tax refund of the person obliged to pay child support and allocate it to the proper recipient. 45 C.F.R. 302.60. OCS may recover an overpayment made to a family by deducting up to ten per cent from future support payments if the money is not returned. 33 V.S.A. § 4104(c) and (d) OCS has broad discretion to enforce (or waive) the payment of support as it affects the best interests of the child. 33 V.S.A. § 4106(d).

The petitioner does not argue that OCS failed to follow these regulations in allocating the support payments in her case or that the methods of allocation are illegal. Rather, she argues that she has a damage claim against OCS for negligence in the establishment and enforcement of her child support rights. She argues that as a matter of equity, her claims should be offset against any claim OCS is making

against her. She argues that on this basis, a determination should be made that she is not overpaid and she should receive the tax intercept amount.

The Board's jurisdiction to grant relief is strictly circumscribed by 3 V.S.A. § 3091(d) which says that "the board may affirm, modify or reverse decisions of the agency; it may determine whether an alleged delay was justified; and it may make orders consistent with this title requiring the agency to provide appropriate relief including retroactive and prospective benefits". There is nothing in this statute which allows the Board to determine damages for negligence and, indeed, the Vermont Supreme Court has specifically determined that the Board has no such authority. Scherer v. DSW, Docket No. 94-206 (March, 1999).

The Board cannot declare that OCS owes the petitioner any amount of money as damages which would offset OCS' valid overpayment claim against her.

Even if the Board had such authority, the Supreme Court has also determined that OCS cannot be sued in any forum for negligence in relation to its activities in establishing and collecting child support. Noble v. Office of Child Support 168 Vt. 349 (1998) The Court held in that case that the doctrine of sovereign immunity prevented any individual from

collecting damages against this state office for alleged failure to diligently pursue child support payments. It must be concluded, that OCS acted properly in allocating the support payments and in attempting to recover payments erroneously made through interception of a tax refund<sup>1</sup>. It had no obligation to give the petitioner its share of the arrearage paid by her child's father. It's decision not to burden her further by collecting the money out of future payments due to her appears to have been a wise use of its discretion in light of the time that had passed and the continuing hardship to her.

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<sup>1</sup> Since OCS has already paid the petitioner her share (and more) of the arrearage in this case, it is very doubtful that it could have legally intercepted the child's father's tax refund to pay the petitioner since no arrearage was owed to her by him at that point.